TESTIMONY

on behalf of

THE NATIONAL SCHOOL BOARDS ASSOCIATION

on

What Price Free Speech? Whistleblowers and the *Ceballos* Decision

Before the

Committee on Government Reform

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Table of Contents

Page

Introduction

The National School Boards Association (NSBA) is a federation of state and school boards associations that represents the nation's nearly 14,500 local school boards. School boards are typically elected (about 97%) and govern their local school systems through the exercise of such functions as setting education and personnel policy for the operation of the school district, determining budget priorities, establishing local standards and providing oversight--while holding themselves accountable to the electorate for how these activities are carried out.

Why did NSBA enter *Garcetti v. Ceballos*?

NSBA filed an *amicus* brief in *Garcetti v. Ceballos*, No. 04-473 (U.S. May 30, 2006) for a number of reasons. First, school boards across the country are the largest of the state and local public employers in the United States and therefore have an interest in all labor and employment decisions affecting public employers at the Supreme Court level. Second, when NSBA surveyed an e-mail group of NSBA's Council of School Attorneys about whether NSBA should participate in *Garcetti v. Ceballos*, we received a large and enthusiastic response from the membership expressing concern about the frequency of litigation over public employee free speech cases in public schools and the detrimental impact of the Ninth Circuit's ruling in this case. Finally, NSBA believed that the Ninth Circuit's ruling in *Garcetti v. Ceballos* was unfavorable to school districts because it could hamper a district's ability to implement a school district's curriculum and could increase meritless litigation.

According to U.S. Supreme Court jurisprudence, public employees' speech is protected by the First Amendment if it passes a two prong test: does the speech (1) address a matter of public concern and (2) does the employee's interest in expressing himself or herself outweigh the government's interest in "promoting workplace efficiency and avoiding a workplace disruption?" In *Connick v. Myers*, 461 U.S. 138 (1982), the U.S. Supreme Court held that speech "as a citizen upon matters of public concern" is protected by the First Amendment while speech "as an employee upon matters only of personal interest" is not. An unanswered question following *Connick v. Myers* was whether an employee can "act as a citizen" when speaking at work on a matter of public concern. In *Garcetti v. Ceballos*, a public employee spoke on a matter of public concern at work about a job-related matter. The Ninth Circuit held that Mr. Ceballos' speech passed the first prong of the above test merely because his speech was on a matter of public concern, regardless of whether he was acting "as a citizen" when speaking. In other words, under the Ninth Circuit's ruling, the possibility of a First Amendment claim arises every time a public employee speaks on a matter of public concern at work.

NSBA was concerned about the Ninth Circuit's holding for two primary reasons. First, if a public school teacher spoke in a classroom about any subject of public concern, his or her speech would be protected by the First Amendment regardless of whether the speech was aligned with or even relevant to the district's curriculum. Second, more public employees who were disciplined or terminated for poor performance would bring First

Amendment claims stating they were really terminated for speaking on a matter of public concern.

Because the media coverage about *Garcetti v. Ceballos* portrayed this case negatively, as limiting employee's whistleblower protections, NSBA became concerned that this case was being perceived too narrowly and inaccurately. Had the U.S. Supreme Court affirmed the Ninth Circuit's decision, a far broader category of speech than speech an employee perceives to be whistleblowing may have been protected by the First Amendment. Moreover, following *Garcetti v. Ceballos*, public employees continue to have broad First Amendment protections related to speech on a matter of public concern – including speech made at work related to an employee's job. Finally, numerous legal and practical realities make it unlikely that school districts will summarily terminate school district employees for speaking at work about matters of public concern related to the employee's official job duties, even if such statements are not protected by the First Amendment.

Classroom speech

The Ninth Circuit holding, which failed to consider whether a public employee was speaking as a citizen when discussing a subject of public concern, basically protected all public employee speech made at work on any topic of public concern, subject to the balancing test articulated in the second prong of the test described above. This holding is particularly problematic for the public schools because teachers are paid primarily to speak in front of a young, impressionable audience and topics of public concern can come up in the public school classrooms on a daily basis. If all speech at a public school on a topic of pubic concern is automatically protected by the First Amendment, school boards could lose control of the curriculum as teachers discuss issues of public concern that have little or no relevance to the curriculum mandated by the school board. Or perhaps worse, under the Ninth Circuit's ruling, teachers could discuss issues of public concern relevant to the curriculum from a perspective with which the school district disagrees, and be protected by the First Amendment.

For example, a health teacher assigned to teach sex education might object to a school district's abstinence-only approach. The school's choice of this curriculum is undoubtedly a subject of public concern. Under the Ninth Circuit's ruling, if the teacher expressed opposition to the abstinence-only policy to students in class and then proceeded to teach about how to use contraceptives, the teacher could assert First Amendment protection if the district disciplined him or her for failing to follow the district's chosen curriculum. While it is likely that the speech in this example would not be constitutionally protected under prong two of the test described above, why should even the possibility of a First Amendment claim arise when teachers, employed to instruct students on the curriculum selected by the school board, fail to do so?

At stake for school boards in *Garcetti v. Ceballos* was the ability of school boards to ensure that students receive the education that they need to be prepared to fully participate in society and the workplace, rather than the education one particular teacher

believes students should be receiving. In a larger sense, what was at stake was the ability of a school board to act as a democracy. The quintessential duty of an elected school board is to decide what will be taught in the local public school. Under the Ninth Circuit's ruling in *Garcetti v. Ceballos*, practically speaking, as long as a teacher is discussing a matter of public concern in the classroom, he or she may get to be the ultimate decision-maker of the school's curriculum, which ultimately undermines the authority of the democratically elected school board.

It is important to understand that NSBA's concerns in *Garcetti v. Ceballos* are not theoretical. For example, in *Mayer v. Monroe County Community School Corporation*, No. 04-1695 (S.D. Ind. Mar. 10, 2006), Ms. Mayer, a teacher, expressed her personal opinions about the war in Iraq in a classroom discussion. After the parents of one student complained, the principal sent a memo asking teachers "not to promote any particular view on foreign policy related to the situation in Iraq." Over the course of the school year, 12 parents complained about the teacher's conduct basically stating that she took a "my way or the highway" approach, she unfairly targeted students she deemed difficult, and she had poor classroom management skills. Eleven of the 12 parents asked that their child be transferred from Ms. Mayer's classroom, yet only one couple complained about Ms. Mayer's speech about the Iraq war. The district did not renew Ms. Mayer's teaching contract because of these performance problems. In spite of this, Ms. Mayer sued claiming the district terminated her because she made statements about the Iraq war which were protected by the First Amendment.

The U.S. District Court for the Southern District of Indiana decided this case before the U.S. Supreme Court decided *Garcetti v. Ceballos*. The *Mayer* court did not follow the Ninth Circuit's approach in *Garcetti v. Ceballos*. Rather, it held that Ms. Mayer was acting as an employee when she was instructing students, rather than a citizen, and therefore her speech was not protected despite the fact that the Iraq war is a matter of public concern. NSBA believes the U.S. District Court reached the right result in its well-reasoned opinion. If the U.S. Supreme Court had adopted the Ninth Circuit's approach in *Garcetti v. Ceballos*, Ms. Mayer's speech may have been protected by the First Amendment. Such a decision would have basically allowed Ms. Mayer, and any other public school teacher, to express whatever views he or she has on any topic of public concern in public school classrooms. Despite the U.S. Supreme Court's ruling in *Garcetti v. Ceballos, Mayer* has been appealed to the U.S. Court of Appeals for the Seventh Circuit.

Endless litigation of First Amendment claims

The Ninth Circuit's holding, which may have protected all public employee speech on any topic of public concern made at the workplace, would have made it easy for any public employee facing an adverse employment action to claim that he or she was being terminated, disciplined, etc. because he or she spoke on a matter of public concern. Stated another way, under the Ninth Circuit's holding every statement of public concern made at work is a possible defense to an adverse employment action.

Virtually all employees at some point in the course of their employment discuss a matter of public concern at work. This is particularly true of teachers who are paid to speak and who in the course of teaching students critical thinking skills may discuss matters of public concern in the classroom. It is likewise true of other school district employees such as teacher's assistants, bus drivers, food service workers, custodian and maintenance employees, etc. Because of this, public employees may even be able to manufacture First Amendment claims when they see "the writing on the wall" that an adverse employment action is likely. In short, had the U.S. Supreme Court upheld the Ninth Circuit's ruling in *Garcetti v. Ceballos*, almost every school employee facing discipline or termination would have been able to assert a First Amendment claim that any statement made on a subject of public concern is in fact the basis for the adverse employment action, as long as the employee alleged a connection between the adverse action and the speech.

Again, it is important to understand that NSBA's concerns are not theoretical that poorly performing employees will point to speech on a matter of public concern, or will create such speech, and claim that it is the real reason they were disciplined or terminated rather than their poor performance. *Mayer v. Monroe County Community School Corporation* is an excellent case-in-point. It strains credibility for Ms. Mayer to claim that the school district failed to renew her contract because of her pro-peace comments about the Iraq war when she received 12 parental complaints about how she treated students and her poor classroom management skills, with 11 parents requesting that their child be transferred from Ms. Mayer's classroom. Another example of a public school teacher who has created numerous First Amendment claims to hide behind his insubordination, poor performance, and personal disputes with school districts is Brian Vukadinovich.[1] Over the past twenty years, Mr. Vukadinovich has filed three lawsuits, against three different school districts claiming he was terminated for speaking on matters of public concern. He lost all three cases and petitioned two of them to the U.S. Supreme Court, who denied *certiorari*.

***Garcetti v. Ceballos* is much more than a whistleblower case**

Garcetti v. Ceballos has been portrayed as a whistleblower case: a deputy district attorney perceives police inaccuracy, reports it to his supervisor who disagrees and takes an adverse employment action after the deputy district attorney testifies for the defense.

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[1] *See Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir. 1988) (finding Mr. Vukadinovich's statements in the newspaper "attempting to articulate his private dissatisfaction with his termination [from a basketball coaching position] and the reasons given for it" was not a matter of public concern); *Vukadinovich v. Michigan City Area Sch.*, 978 F.2d 403 (7th Cir.) *cert. denied*, 510 U.S. 844 (1993); (finding that even if Mr. Vukadinovich's criticism of the school board for hiring a particular superintendent were constitutionally protected speech, his speech was not a factor at all in his termination; also finding that Mr. Vukadinovich could be ordered to stay away from school after he was terminated and had no First Amendment right to speak on matters of public concern at the school); *Vukadinovich v. North Newton Sch. Corp.*, 278 F.3d 693 (7th Cir.), *cert. denied*, 537 U.S. 876 (2002) (finding that even if Mr. Vukadinovich's accusations against the superintendent and school board were constitutionally protected, he could not prove that the school board's alleged reasons for terminating him, insubordination and neglect of duty, were pretextual when he was asked five times to comply with a directive, and refused to comply three times and only made half-hearted attempts to comply two times).

NSBA wants to emphasize the fact the Ninth Circuit's ruling would have protected speech on *any* matter of public concern discussed at work, not just a matter of public concern relating to alleged whistleblowers. NSBA's concerns with the Ninth Circuit's ruling, described above, illustrate how this case has implications far beyond employees who perceive themselves as whistleblowers when they discuss issues of public concern with their employers that pertain to the employees' official job duties.

Not all speech made at work of public concern is a complaint—Ms. Mayer was not blowing the whistle on anyone when she discussed her feeling about the Iraq war or even complaining about any matter related to the school district's policies or practices. Likewise, in writing an *amicus* brief in support of the employer in *Garcetti v. Ceballos*, NSBA was not specifically seeking to deny First Amendment to protection to public employees who bring legitimate concerns to their employers that are of public concern. However, the U.S. Supreme Court's "public concern" jurisprudence does not distinguish between statements that may be perceived as whistleblowing and the kinds of statements public school teachers could make in the classroom. For this reason, both kinds of speech would have been protected by the First Amendment under the Ninth Circuit's analysis. NSBA filed an *amicus* brief to address the latter concerns which did not specifically arise in *Garcetti v. Ceballos*. However, as *Mayer v. Monroe County Community School Corporation* illustrates, classroom speech of a public school teacher on a matter of public concern clearly arises in other cases.

Not all employee complaints amount to whistleblowing

NSBA cautions the Committee to look critically at the notion that all employee complaints on matters of public concern which are related to an employee's official job duties will necessarily be whistleblower speech. Speech that the employee may perceive to be whistleblower speech, the employer may perceive as the employee trying to substituting its judgment for the employer's judgment regarding what the employer's policies should be or how they should be implemented.

A reasonable view of *Garcetti v. Ceballos* is that is exactly what happened in the case. Mr. Ceballos believed there were inaccuracies in an affidavit used to obtain a search warrant, and he recommended that the case be dismissed. His supervisor disagreed and proceeded with the prosecution. The warrant was challenged and Mr. Ceballos testified for the defense, but the trial court rejected the challenge. In short, Mr. Ceballos and his supervisor expressed different *judgment* about this case, and interestingly, the trial court agreed with Mr. Ceballos' supervisor's judgment.

Many school district policies and implementation strategies are a matter of judgment—not a matter of right versus wrong or legal versus illegal. The school board decides what policies it will adopt and the school district administration decides how these policies will be implemented. Just because a food service worker complains that he or she does not believe the district is taking adequate steps to prevent food borne illness, it does not mean the school district has not adopted adequate food safety measures or is not implementing them properly. The food service worker's complaints may merely reflect the fact that he

or she believes the district should adopt his or her preferred approach. In short, under the Ninth Circuit's ruling, a public employee's speech that may be nothing more than an employee wanting to substitute his or her judgment for the employer's, may have been protected by the First Amendment.

What First Amendment rights do employees retain after *Garcetti v. Ceballos?*

Garcetti v. Ceballos is one of a number of U.S. Supreme Court cases discussing and defining public employees' First Amendment rights to speak on matters of public concern. This case only considered one narrow aspect of a public employee's free speech rights—those rights when an employee is speaking at work, about work. The case does not entirely deny public employees First Amendment rights to speak at work about job related matters of public concern. Rather, the case limits First Amendment rights speak on matters related to an employee's official job duties.

While all of the implication of this case may not be perceived as fair, the majority's reasoning makes sense. Government employees are hired to do the government's work and hold trusted positions in our society. When they speak out in contravention of the government's policies they can impair the government's ability to function. As the Supreme Court opined, "Restricting speech that owes its existence to a public employee's professional responsibility does not infringe upon any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."

The following explains in more detail the extensive First Amendment protections that employees retain following *Garcetti v. Ceballos.*

Protection for speech made at work

The Supreme Court explicitly stated in *Garcetti v. Ceballos*, "Employees in some cases may receive First Amendment protection for expressions made at work." To make this point, the Court cited *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 414 (1979). In this case, a junior high English teacher complained to the school principal about employment policies and practices of the school district and the school which she was assigned to teach at, which she perceived to be racially discriminatory. The U.S. Supreme Court held that Ms. Givhan's speech could be protected by the First Amendment despite the fact that it was made at work.

The factual differences between *Givhan* and *Ceballos* drive the different outcomes in the cases and illustrate what kinds of speech made at work about a matter of public concern is still protected by the First Amendment. Questioning the legality of the district's employment practices was not part of Ms. Givhan's official job duties and was therefore protected speech. Advising his supervisors about how to proceed in a pending case was part of Mr. Ceballos' official job duties and therefore was not protected. The U.S. Supreme Court could have overruled *Givhan* and held that an employee can never speak as a citizen at work. By not doing so, the Supreme Court left open numerous instances

where employees can speak about matters of public concern at work which are about work and still be protected by the First Amendment.

Protection for speech made concerning work

The Supreme Court also explicitly stated that "The First Amendment protects some expressions related to the speaker's job." Again the Court cited *Givhan*. In *Givhan*, the teacher was questioning the employment practices of the district and the particular school where she worked. The topic of her complaint was clearly related to her job, but unlike Mr. Ceballos, who was employed to perform the tasks he was speaking about, Ms. Givhan was not employed to implement or assess the employment practices of the district.

This aspect of the Supreme Court's holding in this case is significant. The Court allows employees to retain First Amendment rights to comment on and complain about all aspects of their employer's operations to their employer, as long as the subject of the employee's complaints is not part of their official job duty. While public employees may have much to say about their particular job duties, any minimally observant employee who has any kind of relationship with other co-workers will likely be informed about one, if not many, subjects of public concern related to the employer's operations that have nothing to do with the employee's official job duties. Ms. Givhan is a perfect example. She was not a school board member, a school administrator, a supervisor, or a human resources employee. Therefore, it was unlikely she was in any way involved in the school district's employment decisions. Nevertheless, she had opinions about the district's employment practices.

How broadly or narrowly lower courts view an employee's official job duties will determine how often employee speech is protected by the First Amendment. If lower courts define official job duties very broadly, employee's speech will be protected less often. However, the Supreme Court specifically rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." Implicit is this statement is a warning to lower courts that they too cannot restrict employees' rights by looking at an employees' official job duties too broadly. If lower courts follow the Supreme Court's language and define official job duties narrowly, the category of speech protected by the First Amendment may cover much of employee speech about matters of public concern made at work.

Protection for speech made outside of work

The Supreme Court reiterated the holding of *Pickering v. Board of Education of Township High School District, Will County*, 391 U.S, 563 (1968), that "Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." In short, public employees who have complaints about their government employer and want to be protected by the First Amendment can do the same thing private citizens can do if they have complaints about

the government: public employees can use public forums such as the local newspaper for addressing the concerns they have with the government.

What practical and legal realities make it unlikely that school districts will summarily terminate school district employees for speaking at work about matters of public concern related to the employee's official job duties even if such statements are not protected by the First Amendment?

There are numerous legal and practical realities which make it unlikely that public employers, particularly school districts, are going to frequently fire public employees for speaking on subjects of public concern about the employee's official job duties *regardless* of whether the employees are protected by the First Amendment or whistleblower laws.

Legal realities

First, public school employees have broad employment protections. For example, teachers are often protected by state statutes[2] and collective bargaining agreements[3] that give them a right to continued employment except under extreme and narrow circumstances, which make discipline and termination difficult. Usually, public school

[2] In almost all states, a combination of state statutory and case law grants tenure to teachers who have been teaching for two or three years. See Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Update for 1998 (1998), *available at* http://www.ecs.org/clearinghouse/ 14/41/1441.htm; EDWIN BRIDGES, MANAGING THE INCOMPETENT TEACHER 2 (Education Resources Information Center 1990). This property right to continuous employment, which is protected by the Fourteenth Amendment of the Constitution, guarantees teachers significant substantive and procedural due process rights in the event of attempted dismissal. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). In terms of substantive rights, local school districts frequently can terminate tenured teachers only under extreme and statutorily defined conditions. *See* Education Commission of the States, *supra*; BRIDGES, *supra*. While these criteria vary by state, typical grounds for dismissal include incompetence, immorality, insubordination, and neglect of duty. *See id*. The procedural rights guaranteed by state statutes and case law likewise vary among jurisdictions. Generally, however, a tenured teacher is entitled to timely and adequate notice of the reasons for dismissal, a fair hearing with legal counsel before the school board, an opportunity to cross-examine witnesses, and an impartial decision based solely on the evidence presented. *See* BRIDGES, *supra*; David M. Pederson, Statutory Dismissal of School Employees, in TERMINATION OF SCHOOL EMPLOYEES: LEGAL ISSUES AND TECHNIQUES 10-1-10-2 (National School Boards Association 1997). Moreover, all states allow teachers to appeal the school board's decisions to some entity—a state court, a tenure commission, the state board of education, etc. *See* Education Commission of the States, *supra*. Many states allow teachers to appeal to the state supreme court, meaning the case could be reviewed four or five times. *See id.*

[3] Approximately two of three states have enacted collective bargaining statutes covering teachers and mandating that local school boards bargain with unions over the terms and conditions of employment. Collective bargaining agreements often establish rights and procedures applicable to disciplining and terminating teachers, which usually exceed the rights set forth in state statutes. *See* Education Commission of the States, State Collective Bargaining Policies for Teachers (June 2002), *available at* http://www.ecs.org/clearinghouse/37/48/3748.htm. Typically, these rights include discipline and dismissal for just cause only, which generally involves progressive discipline, due process requirements prior to and during the disciplinary process, and extensive grievance and arbitration procedures that supplement or displace statutory hearing procedures.

teachers are summarily dismissed only in the most egregious cases. More often, problematic employees go through some form of progressive discipline before being terminated. Whether an employee's speech constitutes "just cause" or whether it would meet the statutory criteria for grounds for dismissal has nothing to do with whether it is protected by the First Amendment. It seems unlikely that a decision-maker in a state where teachers have tenure or just cause protection would rule that a district could terminate a teacher who complained to the administration about a matter of public concern related to the teacher's job duties.

Second, current whistleblower legislation may also protect public employees who want to discuss concerns they have related to their official job duties. The majority opinion in *Garcetti v. Ceballos* discusses a number of whistleblower protections that may have been available to Mr. Ceballos had he pursued them. Meanwhile Justice Souter's dissenting opinion, which Justices Stevens and Ginsburg joined, questions whether whistleblower protections adequately cover public employees in all instances. If eight of America's greatest jurists cannot reach agreement about the ability of whistleblower statutes to adequately protect public employees, perhaps an answer to this question is not yet known. In time, however, the answer will become clearer as public employees bring causes of action under whistleblower statutes, collective bargaining agreements, and tenure laws rather than the First Amendment.

Practical realities

In most instances, public employers, and even private employers, have little incentive to fire an employee just because the employee complains about the employer's operations. Public employers, including school districts, exist to serve the citizens of this country and most public employers want to comply with the law. Public school districts in this country are under immense scrutiny by federal, state, and local media, legislators, and citizens to make sure children are: being educated according state and federal education standards, adequately prepared to compete in the global economy, treated equally, and educated in a safe environment.

Most school districts do not want to spend their scare resources punishing teachers who speak out rather than educating children when the public reaction to such punishment will likely be negative – regardless of whether it is permitted by the First Amendment. In choosing whether to create a culture of either discouraging private communication with employees regarding school district operations, or encouraging public airing of these issues, clearly the balance is with encouraging employees to frankly discuss their concerns with the employer. Moreover, serious teacher shortages exist in certain subject areas and geographic regions, and at minimum, a perception exists that many teachers could make more money working in the private sector. Few school districts could afford to terminate an otherwise well-performing teacher who complained about a matter of public concern related to his of her official job duties.

Taking suggestions from employees is often in the employers best interests and happens at worksites of all kinds every day. If a public employer made a practice of firing

employees who complained about something related to their official job duties, the public employer first, might not have many employees left in a short period of time, and second, probably would have a difficult time recruiting qualified candidates. The public employer/ public employee relationship tends to be a long term ongoing relationship where both parties have an incentive to be respectful of each others opinion regardless of what the First Amendment protects or does not protect.

Conclusion

For all these reasons, NSBA supports the outcome of *Garcetti v. Ceballos*, and we look forward to any future guidance the U.S. Supreme court or lower courts provide in defining the application of this case.